HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

LETTERS PATENT APPEAL NO. 34 OF 2006.
IN
WRIT PETITION NO. 3443 OF 2005.

M/s. Mahikawati Pan Utpadk. ..Appellant.

Versus.

Smt. Sarika Sudhekar Vartak. ..Respondent.

Mr. K.P.Anilkumar for the appellant.

Mr. Rajesh Gehani for the respondent.

CORAM: S. B. MHASE &
SMT. NISHITA MHATRE, JJ.

DATE: JANUARY 31, 2007.

P.C.

1. Heard counsel for both sides.

2. Reference (IDA) No. 272 of 2000 was decided by the 1st Labour Court, Thane on 18.1.2005 and appellant was directed to re-instate the respondent - workman with full backwages with continuity of service as per the Rules with effect from 1.9.2000. The said award was challenged by filing writ petition being Writ Petition No. 3443 of 2005. The learned Single Judge of this Court rejected the said writ petition in limine. As against that order dated 21th November 2001 the present LPA is directed.

3. Mr. K.P. Anilkumar learned counsel for the appellant submitted that the appellant is a farmers' society and the respondent was admittedly appointed in the said society on 1.9.2000 and therefore on the date of removal the provisions of Section 25F and 25G of the Industrial Disputes Act, 1948 were not applicable, and therefore the reasoning adopted by the Labour Court is not justified in law. We are not in agreement with the learned counsel. What is pertinent to note is that the respondent has specifically averred in her application that she (respondent-employee) was appointed in the year 1990. It is further to be noted that the appellant in its reply before the Labour Court has admitted that the respondent is in employment since 1990. Therefore, as a result of the admission given by both sides it was a proved fact that the respondent was employed with the petitioner since the year 1990. Under these circumstances, on this proved fact the cross examination should not have been allowed. Therefore, the admission which is tried to be relied upon by the appellant cannot be read into evidence and cannot be considered. The Labour Court and the learned Single Judge, both have rightly ignored the said admission being incorrect one. We are in agreement with the Labour Court as well as learned Single Judge.

4. Another ground which has been raised by the learned counsel for the appellant is that the society is closed. However, this plea has not been proved and established in trial Court. Nothing has been demonstrated before us except the bare statement of the learned counsel that the society is closed. We do not find any reason to disturb the finding of the trial Court and learned Single Judge.

5. Third and last ground raised by the appellant is in respect of the full backwages. Learned Counsel for the appellant submitted that the burden to prove that the respondent- employee was not gainfully employed was on the respondent- employee and the said burden has not been discharged by the respondent - employee, therefore, the order of backwages is bad in law. Learned counsel relied upon **2006 I CLR 39 in the matter of U.P. State Brassware Corporation Ltd and Anr v/s. Udai Narain Pandey** in support of the submission made by him that the burden to prove that the respondent - employee was gainfully employed was not on the employer but on the employee. We are not in agreement with the learned counsel. So far as the proposition of law as laid down by the Apex Court is concerned, we cannot dispute it. However, what we find is that the respondent has pleaded in her claim -

petition that the she (respondent) is not gainfully employed anywhere. Apart from that, in her statement she has stated that the respondent at present is at home and is being maintained by the income of her husband. Thus, the respondent has stated on oath that she is not gainfully employed. What we find is that so far as the unemployment of the respondent is concerned, the solemn statement of the respondent is sufficient to discharge the burden. Except this no other evidence can be brought by the employee to discharge the burden. Then it is for the employer to demonstrate that the employee was gainfully employed elsewhere. Therefore, even accepting the ratio laid down by the Apex Court in the aforesaid case, we find that the burden has been rightly discharged by the respondent - employee and the order of re-instatement with backwages as passed by the Labour Court is just and proper. We do not find any substance in the appeal, therefore we refrain ourselves from entertaining this appeal. Letters Patent Appeal is therefore dismissed.

(SMT. NISHITA MHATRE, J.) **(S.B.MHASE, J.)**

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